

CIVIL CASE LAW UPDATE

(f)(2) Unless the court approves the proposed order submitted with an initial memorandum, or unless otherwise directed by the court, the prevailing party shall, within fifteen days after the court's decision, serve upon the other parties a proposed order in conformity with the court's decision. Objections to the proposed order shall be filed within five days after service. The party preparing the order shall file the proposed order upon being served with an objection or upon expiration of the time to object.

Utah R. Civ. P. 7(f)(2)

Cent. Utah Water Conservancy Dist. v. King, 2013 UT 13. Previously the Utah Court of Appeals has held that an appeal is fatally premature if there is no final judgment that complies with Utah R. Civ. P. 7(f)(2) (that the final judgment has been prepared by a party or the court has expressly stated that no further order is necessary). Now the Utah Supreme Court has agreed. Where Rule 7(f)(2) has not been complied with, the appeal will be dismissed for lack of jurisdiction. The Court also instructed its advisory rule committee to consider ways of creating finality where no compliant order is ever filed (such as the federal system that sets a maximum time period of 150 days in which to file a notice of appeal if no "final" judgment is ever filed).

Gabelli v. SEC, USSC 11-1274. A unanimous Court rejected the application of the fraud discovery rule to an SEC penalty action. A private party's statute of limitations for filing a fraud action is stayed until the discovery of the fraud, or until the fraud reasonably should have been discovered. The Court held that, as a matter of federal law, the discovery rule does not apply to the government. While this decision does not apply to state causes of action, Utah courts may be persuaded to follow it as well.

Hollingsworth v Perry, USSC 12-144. This appeal involved California's Proposition 8 on same-sex marriages. Its importance is not due to the merits of the appeal, but the Court's ruling on standing. California's state officials refused to defend the constitutionality of Proposition 8 on appeal. As a matter of California law, the California Supreme Court advised the 9th Circuit that the proponents of a proposition had standing to defend it in court when the elected officials refused to do so. The majority of the US Supreme Court held that, under federal law, the proponents did not have standing. The desire to defend the constitutionality of a state law, where petitioners were not being ordered to do or cease to do anything, was only a generalized grievance that was insufficient to confer standing. This decision emphasizes the importance of remembering that federal and Utah standing are not the same and a party that might have standing in Utah's courts might not have standing in the federal courts.

Adoptive Couple v. Baby Girl, USSC 12-399. A biological father (a Native American) agreed to relinquish his parental rights in his unborn child. When he learned that the child's mother (who is not a Native American) intended to give the child up for adoption, the father brought an action under the Indian Child Welfare Act (ICWA) to stop the adoption and obtain custody of his daughter. The US Supreme Court held that ICWA's provisions were meant to protect existing custodial relationships, not create a custodial relationship that had never existed. The Court held where the non-Indian parent had sole custodial rights, ICWA could not be used to challenge her decisions concerning the child on behalf of a biological father who had abandoned his child and never had legal or physical custody.

Univ. of Texas v. Nassar, USSC 12-484. US Supreme Court held that a Title VII retaliation claim required a showing of but-for causation (but-for the motive of retaliation, the challenged action would not have been taken). The Court reversed the 5th Circuit's use of the lesser standard used for claims of Title VII status-based discrimination (plaintiff only has to show that the desire to discriminate was one of the motives for the challenged action, even if the employer also had legal motives to take the action as well).

Vance v. Ball State Univ., USSC 11-556. Title VII makes an employer strictly liable for workplace harassment by a supervisor (with some limited affirmative defenses). The Court acknowledged that Congress did not use the term supervisor in Title VII, but it is part of the Court's interpretation of that statute. The Court adopted a limited interpretation of who qualified as a supervisor for whose actions the employer can be vicariously liable. A supervisor is someone empowered by the employer to take tangible employment actions against the victim. The Court rejected the EEOC's test for who is a supervisor because it was not capable of being easily determined without creating questions of fact that would have to be resolved by a jury.

Fisher v. Univ. of Texas, USSC 11-345. Petitioner, a Caucasian, sued the university claiming it violated her constitutional right to equal protection when it rejected her admission's application because of her race. The 5th Circuit upheld the constitutionality of the university's actions, holding that petitioner could only challenge whether the university's decision was made in good faith. The 5th Circuit also held that it had to apply a degree of deference to the university's decision. The Court reversed, holding that the lower court had failed to review a racial classification imposed by the government under the strict scrutiny standard. The lower court should have assessed whether the University had offered sufficient evidence to prove that its admissions program was narrowly tailored to obtain the educational benefits of diversity.

Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc., USSC 12-10. The Department of Health and Human Services and the United States Agency for International Development not only set restrictions on how recipients could use certain federal grant money, but also required that recipients adopt a policy explicitly opposing prostitution. Any organization that did not have such a policy, even if it did not advocate prostitution, could not receive a grant. The Court held that this requirement that all recipients adopt and espouse the government's point of view as their own violated the recipients' First Amendment rights.

In the Matter of the Discipline of Jonathon W. Grimes, 2012 UT 87. The Supreme Court emphasized that, in bar disciplinary proceedings, any mitigating factors must be “truly compelling.” The Court clarified that this is a high burden to meet and reversed the trial court’s finding of mitigating circumstances in this matter.

In Re Baby Girl T, 2012 UT 78. In a 3-2 decision, the Supreme Court held that a due process claim had been preserved in the trial court even though the phrase “due process” was never used. The Court held that passing statements concerning constitutional rights and protections were enough to have preserved a due process challenge.

Pioneer Builders v. K D A Corp., 2012 UT 74. The Supreme Court held that sufficient information that would put a successive purchaser on notice that there might be preexisting unrecorded leases on property was enough to create constructive notice (thereby making the purchaser take the property subject to the leases). This case is important because it renews the Court’s reliance on inquiry notice as being sufficient and not actual knowledge or some other higher standard.

Prinsburg State Bank v. Abundo, 2012 UT 94. The trial court ruled on all but one issue in this action. The parties then stipulated to the entry of a final order. But the stipulation covered all of the issues (restating the trial court’s prior rulings as to the other issues) and not just to the remaining issue. On appeal the Supreme Court held that the stipulation acted as a waiver by the appellant of ALL of the issues it covered.

Salt Lake City Corp. v. Jordan River Restoration, 2012 UT 84. Salt Lake brought a validation proceeding to obtain a permanent injunction against anyone challenging the validity bonds it was about to issue. But Salt Lake did not give all taxpayers actual notice, only notice by publication. In a 4-1 decision the Supreme Court held that notice by publication was sufficient because of the number of taxpayers involved and the city did not have a list of all such taxpayers, though such a list was in the possession of Salt Lake County.

UTA v. Local 382, 2012 UT 75. UTA brought this action seeking declaratory relief as to whether its contract with the union required it to arbitrate certain issues. Though the district court ruled in UTA’s favor, the parties had entered arbitration. After the appeal was filed, arbitration ended and a new negotiations between the parties resolved the remaining issues. The Court held that the actions of the parties mooted the appeal.

State v. Arriaga-Luna, 2013 UT 56. This criminal case is important for civil attorneys as well. The court held that factual findings made by the trial court on a motion to suppress evidence were not entitled to deference. The trial court’s decision was based on its review of transcripts of the defendant’s police interrogation. There was no live testimony. The court held that it owed the trial court no deference in these circumstances. Further, the court stated that the need to develop a uniform body of appellate law to govern police interrogation practices could lead the court to limit the deference shown even where live testimony had been considered. Id. at ¶8. The court used its developing mixed question of law and fact standard of review.

Turner v. Univ. of Utah Hosp. & Clinics, 2013 UT 52. Previously, Utah followed the “cure-or-waive” rule that required a litigant to use all of his or her preemptive jury challenges on jurors that the litigant had unsuccessfully challenged for bias/cause to preserve the right to challenge the district court’s rulings on appeal. The court abandoned the “cure-or-waive” rule and replaced it with a rule that only requires that: “(a) all of the party’s peremptory challenges were used and (b) a juror who was previously challenged for cause ends up being seated on the jury, the issue of jury bias has been preserved.” Id. at ¶32.

Torrie v. Weber County, 2013 UT 48. Officers engaged in a high-speed pursuit owe a duty of care to the fleeing suspect.

Insight Assets, Inc. v. Farias, 2013 UT 47. The court held that the plaintiff’s claims were barred by laches even though the action was filed within the applicable six-year statute of limitations. While the general rule remains that laches will not bar a claim that is timely under the statute of limitations, the court held that in equitable actions the equitable defense of laches can apply before the statute of limitations has run.

Hill v. Nakai, 2013 UT 46. Nakai sought part of a probate estate based on the common law doctrine of equitable adoption. The three-justice majority held that this doctrine had been preempted by the detailed provisions of Utah’s probate code as to who is an heir. The decision is important outside probate practice because of its explanation of Utah’s statutory preemption law.

State v. Canton, 2013 UT 44. While a criminal case, this decision is important in civil matters because of its explanation of statutory construction. While the use of dictionaries is an important first step in determining the meaning of an undefined statutory term, it is not always final. Often the dictionary definitions will need further refinement by selecting the best meaning among a range of options found in the dictionary. This selection is often based on other indicators of meaning found in the statute. Id. at ¶13.

Gregory v. Shurtleff, 2013 UT 18. Plaintiffs challenged the constitutionality of an education bill under two provisions of the Utah Constitution. A three-justice majority of the Court held that the plaintiffs had no standing to raise their claims under one constitutional provision, but did have jurisdiction under the other provision. The two-justice dissent argued that the plaintiffs were without standing to raise any of their claims. All justices agreed that the plaintiffs did not meet the traditional standing test. The majority held that the plaintiffs had jurisdiction under the special public-interest test for some of their claims. The public-interest test gives a party standing if: 1) the issue raises questions of great public impact and societal concern; 2) the plaintiff is an appropriate party to raise the issue (has the necessary interest and ability to assist the Court in developing and reviewing the issue); and 3) that the issue is unlikely to be raised if the plaintiff is not given standing. The majority defined “appropriateness” as a matter of competency. They found the plaintiffs’ attorneys to have competently presented the first issues, but not the second. Anyone presented with a standing issue under Utah law should definitely read both the majority and the dissent carefully.

Peak Alarm Co., Inc. v. Salt Lake City, 2013 UT 8. The Court held that plaintiffs filing claims under the Utah Governmental Immunity Act do not have to comply with the statutes of limitations that would apply if the same claim was brought against a private party. The plaintiffs only have to comply with the notice of claim provision and timely file their action after the claim has been denied.

In the Matter of the United Effort Plan Trust, 2013 UT 5. The Utah Supreme Court continues to evolve the standards of review that they will use. In this case, involving the denial of a motion to intervene, the Court provides details on the various standards of review (questions of law, facts, and mixed questions) and how each standard will be applied (§§15-23).

Supernova Media, Inc. v. Pia Anderson Dorius Reynard & Moss, LLC, 2013 UT 7. The Court acknowledged that it had previously reviewed a district court's decision on a motion to intervene under a correction of error standard. But the Court held that review of a motion to intervene could use one of several standards depending on the specific question raised (§§13-18).

Murray v. Utah Labor Comm'n, 2013 UT 38. Reversing several earlier lines of decisions, the Utah Supreme Court held that the Utah Administrative Procedures Act did not designate all of the standards of review that Utah's courts should use in reviewing formal administrative proceedings. With some exceptions (identified by the Court in §19), the courts will use the same standards of review as used in other appeals. Specifically, the Court stated that it would use its general test for determining what standard of review to use for mixed questions of law and fact (§§23-34).

Harris v. Shopko, 2013 UT 34. Harris alleged that she was injured due to Shopko's negligence while she was in its store. The Court of Appeals held that Shopko could not ask the jury to consider Harris' pre-existing injury because it was asymptomatic at the time of her injury. The Utah Supreme Court reversed, holding that a defendant can ask the jury to consider whether any part of the plaintiff's injury was caused by the pre-existing injury, even if plaintiff was not suffering any symptoms before the new injury occurred, so long as the defendant presents sufficient evidence to support its claim that part of the plaintiff's post-injury suffering was caused by the pre-existing injury (defendant cannot ask the jury to speculate).

Metro. Water Dist. of Salt Lake and Sandy v. Sorf, 2013 UT 27. Plaintiff's summons and complaint were left at Sorf's residence with his long-term, live-in girlfriend. After default was entered, Sorf moved to have it set aside claiming that he was unaware of service and didn't realize he had to file a response. The district court denied Sorf's motion, holding that Sorf had been properly served. The Utah Supreme Court reversed. The Court held that the fact Sorf had been properly served did not prevent the defendant from showing that his failure to timely respond was due to mistake, inadvertence, surprise, or excusable neglect.

High Country Prop. Rights Group v. Emmer, 2013 UT 33. The Court, in Justice Lee’s decision, expands the method by which the plain language of a statute should be interpreted. In a statute concerning non-profit corporations, the legislature used the term “independent” directors. The Court started by looking at the common meaning given to the word in dictionaries (¶¶18-19). The Court then acknowledged that dictionaries will rarely dictate the exact meaning that the word must have, but only a range of meanings that the word has had (¶19). The Court must then look for the core concept or the key determinant found in the various meanings of the word (¶¶20-21). Then the Court looks to the other indicators of statutory meaning “focusing on the language and structure of the surrounding terms of the statute” (¶22). Please note that this test is much more than simply quoting one of several definitions found in a dictionary.

Jenkins v. Jordan Valley Water Conservancy Dist., 2013 UT 59. Plaintiffs sought compensation for damages resulting from a broken water line. The court of appeals held that the plaintiffs did not need expert testimony as to the violation of the applicable standard of care because the district had determined it should replace the pipe in question three years earlier. Reversing the court of appeals, the Supreme Court held that an internal decision to replace a pipe did not establish the standard of care for maintaining a water line had been violated and that jurors would not have the special knowledge needed to know the standard of care and whether it had been violated without expert testimony. This decision is also significant because, having reversed and ordered judgment in favor of the district on the question of expert testimony, the court vacated the court of appeals’ holdings on governmental immunity and the public duty doctrine.

Taylor Electric, Inc. v. Fox Constr., Inc., 2012 UT App 324. The Court of Appeals held that court transcripts can be used as evidence in support of a motion for summary judgment. But they have to be official transcripts, prepared by a “disinterested ‘official court transcriber.’” The Court held that a transcript prepared by the wife of the principal in one of the party companies could not be used.

Berrett v. Albertsons, Inc., 2012 UT App 371. The Court of Appeals recognized an exception to the general rule that an employer is not responsible for damages caused by an independent contractor’s negligence where the employer did not control the manner in which the work was performed. The court adopted §413 of the Restatement (Second) of Torts for the proposition that an employer is liable if the employer should have recognized that the independent contractor’s method of doing the work would create “a peculiar unreasonable risk of physical harm to others unless special precautions are taken.” Whether a peculiar unreasonable risk was created is a question of fact that often will require a jury trial be held.

State v. Rasabout, 2013 UT App 71. While this is a criminal case it is important to civil practitioners because of its use of the internet. In his concurrence, Judge Orme uses information obtained from the internet as evidence that the criminal defendant's story is implausible. Judge Orme took judicial notice of the estimated travel time for a journey given by MapQuest (§52 n.14) in rejecting the defendant's testimony as to how quickly he made the journey. This is a significant leap in the use of the internet from its prior use in defining the colloquial meaning of a common term. See Fire Insurance Exchange v. Oltmanns, 2012 UT App 230 (using Wikipedia in determining the common meaning of a term used in a contract).

McQueen v. Jordan Pines Townhomes Owners Assoc., Inc., 2013 UT App 53. This case is important for §9 n.4. This footnote discusses the appropriate use of legislative history. The Court rejected the Association's reliance on anecdotal stories of the experiences of some individuals as they sought to have a statute amended as evidence of the legislature's intent. "Proper examples of legislative history include legislative floor debates, committee reports, transcripts of discussions at committee hearings, conference committee reports, analyses of bills by legislative counsel and administrative departments, amendments accepted and rejected, and prior and subsequent legislation dealing with the same subject matter."

Murray Place v. Varela, 2013 UT App 19. A party that seeks to set aside a default judgment because the court lacked jurisdiction does not have to show it has a meritorious defense. The court's lack of jurisdiction is enough. The Utah Court of Appeals also noted (§1 n.1) that the entry of a final judgment that complied with Rule 7(f)(2) AFTER the notice of appeal had been filed gave the appellate court jurisdiction over the appeal.

Tomlinson v. NCR Corp., 2013 UT App 26. NCR's policy manual expressly stated that certain groups of its workers were at-will employees. The Court held that this created the reasonable inference that all other employees who were not specifically stated to be at-will could only be terminated for cause.

Discover Bank v. Kendall, 2013 UT App 87. Kendall served requests for admissions on Discover Bank. The bank failed to timely answer the requests. Kendall filed a motion for summary judgment relying on several of the admissions that were deemed admitted due to the bank's failure to answer. The bank opposed the motion for summary judgment and filed its untimely answers to the requests for admissions, but the bank did not seek to have its admissions withdrawn or amended. The district court granted Kendall summary judgment. On appeal, the Utah Court of Appeals affirmed. The appellate decision contains a good discussion about why motions to withdraw or amend admissions should not be routinely granted.

Woodward v. LaFranca, 2013 UT App 147. In a custody battle, the trial court rejected the testimony of most of the professionals (evaluator, special master, and therapist) and the father, finding the mother's testimony to be more credible. The Court reversed most of the lower court's credibility decisions. In doing so, the Court relied heavily on the fact that the lower court's findings of facts did not expressly state why the rejected testimony was not as credible.

Williams v. Dep't of Corr., 2013 UT App 159. The pro se petitioner brought a motion in the district court to disqualify counsel for the respondents. The court dismissed the petition without ruling on the motion to disqualify. The Court of Appeals reversed and remanded to the district court to rule on the motion to disqualify on the grounds this motion should have been considered before the district court proceeded further on the merits.

Pentskiff v. Dep't of Health, 2013 UT App 156. The department changed its regulations to limit who could seek a hearing from the Division of Medicaid and Health Financing Office of Formal Hearings. Pentskiff, that provided interpretive services to clients of a managed health plan, had previously been permitted to use the Division's hearing process to challenge the plan's failures to pay some of Pentskiff's claims, or the plan's failure to pay the claims in full. The new regulation limited the use of the hearing process to patient's claims that medicaid had not paid for approved services or had wrongly failed to approve services for payment. Pentskiff, in part, argued that it had been substantively prejudiced by the agency's actions that did not comply with the agency's prior practice. The Court held that changing the agency's policies to more closely follow applicable federal law and regulations, that did not envision the use of a state's hearing process to adjudicate contractual and payment claims between a provider and its subcontractors, was a fair and rational basis for the agency to depart from its prior practice. Pentskiff was therefore not entitled to relief on the basis of the Division's rule change.

Emp'r Reinsurance Fund v. Utah Dep't of Labor, 2013 UT App 139. Petitioner asked the Court to consider its petition for judicial review, that was filed before any final agency action was taken, as an interlocutory appeal. The Court held that it did not have jurisdiction to do so because the legislature had, by statute, only given the courts jurisdiction to review an agency's final action, not its interlocutory orders.

Horne Family Revocable Trust v. Wardley/McLachlan Development, 2013 UT App 129. Where the district court's final judgment is based on two or more independent alternative grounds, Utah's appellate courts will not reverse when the appellant has not challenged all of the alternative grounds supporting the district court's decision.

Stone v. M&M Welding and Constr., 2013 UT App 233. Stone's employment was terminated after he informed his employer that he was filing a workers' compensation claim, but before the claim was actually filed. The court rejected the argument that Stone could not show retaliation because his termination occurred before the filing of the claim. Stone could prevail if he showed he was terminated because he gave notice of his intent to file. The court explained that to do otherwise "would create a perverse incentive for an employer to discharge an injured employee as soon as the employer learns of the employee's intention to file a claim." Id. at ¶11.

Howick v. Salt Lake City Corp., 2013 UT App 218. Howick, an attorney working for the city, accepted a position for more pay that required her to agree to give up her merit employee status. Years later, when the city sought to fire her, Howick claimed that she was still a merit employee and the agreement was invalid under the applicable version of the merit protection statute. The court held that public policy did not preclude Howick from waiving her merit employee status and remanded the case for factual findings. Judge Orme's concurrence explained that he would have trouble finding public policy did not prevent such a waiver if the plaintiff had been a "less sophisticated, less well educated employee."

Dennett v. Ferber, 2013 UT App 209. The plaintiffs filed their notices of appeal after the denial of their post-judgment motion. Later, the district court ruled on the plaintiffs' rule 60(b) motion. One plaintiff filed an amended notice of appeal, Dennett did not. The court held that it was without jurisdiction to consider Dennett's challenge to the district court's denial of the 60(b) motion because it was not covered by the original notice of appeal.

Velander v. LOL of Utah, LLC, 2013 UT App 196. The filing of an untimely post-judgment motion does not stay the time for the filing of a notice of appeal.

Wintle-Butts v. CSRO, 2013 UT App 187. The court addressed whether an issue had been properly raised in the formal administrative proceeding and preserved for judicial review. The court rejected the use of the less stringent "level of consciousness" standard. Instead the court held that an issue was preserved only if it is timely and specifically raised before the administrative agency with supporting evidence or relevant legal authority. Id. at ¶13 n.4.

Cressman v. Thompson, 10th Cir. 12-6151. Many Oklahoma license plates include a depiction of a statue of a Native American. The sculpture is entitled "Sacred Rain Arrow," and plaintiff alleged that it depicted and communicated Native American religious beliefs that are contrary to the Christian beliefs of the plaintiff. In a 2-1 decision, the Court reversed the dismissal of the action and the denial of a preliminary injunction. The Court held that the plaintiff had stated a plausible claim of compelled speech in his complaint.

Pahls v. City of Albuquerque, 10th Cir. 11-2055. The Court took judicial notice of a google map and satellite map of the terrain at issue "whose accuracy cannot reasonably be questioned" (fn1).

Henderson v. Bd. of County Comm'r for San Miguel County, 10th Cir. 12-2057. Plaintiffs' child was killed when the car he was driving was struck by a train. In their negligence action against the owner of the roadway the plaintiffs did not submit expert testimony as to the applicable standard of care. A majority of the court held that the jury could determine the standard of care applicable to the construction and maintenance of a public railroad crossing and whether it had been violated based on the evidence. Judge Hartz filed a very strong dissent.

Elwell v. Byers, 10th Cir. 11-3172. A majority of the court held that foster parents that were in the process of adopting a foster child and had been the care givers of the child throughout the child's life had a constitutionally protected liberty interest in familial association. The foster parents claims were dismissed because this interest had not been clearly established at the time the state officers acted.

Espinoza v. Dep't of Corr., 10th Cir. 12-1009. Espinoza brought a Title VII retaliation claim against his employer. Affirming the dismissal of the action, the Court emphasized that to meet the first element of the retaliation test, the plaintiff needed to show not only that he *subjectively* (in good faith) believed that his employer was engaged in unlawful employment practices, but also that his belief was *objectively* reasonable in light of the facts and record presented.